MERIT PRODUCTIONS, ET AL.

IBLA 96-429, 96-456 Decided May 29, 1998

Appeal from two decisions of the Wyoming State Office, Bureau of Land Management, declaring oil and gas leases terminated by cessation of production. WYW05038, WYW05038-B, WYW0138462.

Affirmed.

1. Oil and Gas Leases: Extensions--Oil and Gas Leases: Termination--Oil and Gas Leases: Well Capable of Production

Where, following receipt of a 60-day notice from BLM that it does not regard an oil and gas lease as containing a well capable of producing hydrocarbons in paying quantities, the operator or lessee of such lease in an extended term by reason of production fails to present any evidence establishing the well's current potential production and to produce the lease, the lease is properly declared to have terminated on account of the cessation of production.

APPEARANCES: Larry Sessions, Operating Manager, Merit Productions, Powell, Wyoming.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Merit Productions (Merit), 1/ appeals from two Decisions of the Wyoming State Office, Bureau of Land Management (BLM), dated May 9, 1996, and June 7, 1996, declaring oil and gas leases WYW05038, WYW05038-B, and WYW0138462 terminated because of cessation of production. Leases WYW05038 and WYW05038-B were issued effective April 1, 1951, for a fixed term of

1/ Merit filed one appeal on June 21, 1996, of the May 9, 1996, Decision which addressed leases WYW05038 and WYW05038-B. This was docketed as IBLA 96-429. Merit filed a second appeal on July 18, 1996, of the June 7, 1996, BLM Decision which addressed lease WYW0138462. This was docketed as IBLA 96-456. As the two cases relate to the same issue and embrace the same parties-in-interest, they have been consolidated on appeal.

years and so long thereafter as oil and gas was produced in paying quantities. Lease WYW0138462 was issued effective September 1, 1961, for a period of 10 years, with the same condition that it would remain in effect so long thereafter as oil and gas was produced in paying quantities. Production was had under all three leases.

On January 19, 1996, BLM advised Larry Sessions, Operating Manager of Merit, that BLM records showed that there had been no production from lease WYW05038 since October 1994, no production from lease WYW05038-B since September 1994, and no production from lease WYW0138462 since July 1995. The BLM reminded Merit that the leases had been extended so long thereafter as hydrocarbons were produced from the leaseholds. The BLM advised that, in accordance with 43 C.F.R. § 3107, these leases must each contain a well capable of producing leasehold substances in paying quantities, i.e., sufficient quantities to pay the day-to-day operating and lease maintenance costs or they would be considered to have expired upon cessation of production. The January 19, 1996, letter further advised that within 60 days, Merit must undertake diligent work-over operations or drilling operations to restore production in paying quantities or these leases would terminate by operation of law.

On April 24, 1996, the District Manager, Worland District Office, BLM, advised the Wyoming State Director, BLM, that Merit had no wells capable of production in paying quantities. The District Manager recommended the leases be terminated effective January 31, 1996.

In its Decision dated May 9, 1996, BLM found that despite the 60-day notice of January 19, 1996, which granted Merit 60 days in which to commence reworking or drilling operations, "no reworking or drilling operations were commenced within the specified timeframe. Therefore, the term of lease WYW05038 and WYW05038-B are exhausted and the leases are held to have terminated by cessation of production[.]" (May 9, 1996, Decision at 1.) In the BLM Decision dated June 7, 1996, lease WYW0138462 was similarly terminated for the same reason. The operative BLM language stated "the term of lease WYW0138462 is exhausted and the lease is held to have terminated by cessation of production." (June 7, 1996, Decision at 1.)

In its Statement of Reasons (SOR) for appeal of the May 9, Decision, filed June 21, 1996, regarding leases WYW05038 and WYW05038-B, Merit states, in pertinent part:

> The termination of the leases will cause irreparable harm to us; we are in the process of negotiating the sale of the oil wells to K.C.S. Mountain Resource, Inc. * * * Harm to Merit Productions and those interested in the purchase of these oil wells outweighs the need to terminate these leases. Because of the great harm that will befall Merit Productions, and the good faith effort of trying to resolve the problem without such drastic mea sures as per this termination, we appeal and ask for a stay of

> this decision so that affirmative action can be taken on our part, rather than negative action that is against sound public interest.
>
> Also, Merit Productions appeals this decision because it does not believe that the oil wells have been abandoned. Enclosed are expenses Merit has put into these wells to ready them for production. Expending time and money is a sure determinative that Merit Productions has no intent of abandoning these oil wells.

In its submission to this Board on July 18, 1996, Merit made exactly the same points in its SOR with regard to the June 7, 1996, BLM Decision and used exactly the same language that is quoted above.

Merit attached the same two documents it claims were bills for $2,200 in August 1995, for a flow line for the Coon Creek Well, and a March 1996 invoice for $1,300 for "repairs to start again," to each of its appeals. The two invoices, although purportedly executed 8 months apart, have consecutive invoice numbers. Additionally, the purported invoices do not indicate which wells, if any, on these three leases or on some other lease were the subject of these purported expenditures. Nor has Appellant indicated in its SOR which wells or leases these "repairs" relate to. There is no indication in either SOR whether these repairs or this reworking was actually completed or whether these were estimates for work which would have to be done before production could begin. Moreover, there is no showing of any specific action taken, in either SOR, which actually represented efforts to prepare for, or to begin production, on the three leases in the 60 days after the January 19, 1996, letter. Rather, Merit states elsewhere in both SORs that the efforts were being made to prepare the wells for sale to a willing buyer. 2/ This admitted focus on other than production is consistent with the letter of the District Manager, Worland District, to the State Director on April 24, 1996, more than 3 months after the 60-day letter issued, that none of the three leases had wells capable of production in paying quantities.

[1] Section 17(f) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(f) (1994), provides that an oil and gas lease in its extended term terminates by operation of law when paying production ceases on the lease, subject to three statutory exceptions. Great Plains Petroleum, Inc., 117 IBLA 130, 132 (1990); C & K Petroleum, Inc., 70 IBLA 354 (1983); Michael P. Grace, 50 IBLA 150 (1980); John S. Pehar, 41 IBLA 191 (1979). The exceptions provide that no lease shall terminate for cessation of production if: (1) Reworking or drilling operations are begun within 60 days

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2/ A conversation record in the file indicates that, in response to Merit's statement that K.C.S. Resource, Inc. was a potential buyer, that company was called by BLM and indicated that it was not an interested buyer of any of the Merit interests in the three leases.

after cessation and are continued with reasonable diligence until production resumes; (2) the Department has ordered or consented to suspension of operations or production; or (3) for lands on which there is a well capable of production, the lessee places the well in production within 60 days after receipt of notice to do so. See 43 C.F.R. §§ 3107.2-2, 3103.4-2, 3107.2-3.

In this case, there is no credible evidence that any reworking or drilling operations were underway within 60 days after cessation of production on these three leases, and the Department did not order or consent to a suspension of operations or production on the leases. In its letter of January 29, 1996, BLM properly notified Merit that "[p]rior to April 1, 1996, diligent workover operations or drilling operations must be resumed to restore production in paying quantities or these leases will terminate by operation of law." See Michael P. Grace, supra, at 151; Cf. C & K Petroleum, Inc., supra. Merit did not respond to this notice.

When it is determined that production has ceased on an oil and gas lease in its extended term because the well or wells on the lease are no longer capable of production in paying quantities, the affected parties, including the lease operator and the lessees of record, are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well. Daynon D. Gililland, 108 IBLA 144 (1989), C & K Petroleum, Inc., supra; John Swanson, 51 IBLA 239 (1980). In this case, Merit has not contested BLM's finding that the wells on leases WYW05038, WYW05038-B, and WYW0138462 ceased production in October 1994, September 1994, and July 1995, respectively. Nor has Merit submitted any evidence regarding the productive capacity of any of the wells on the three leases. The only relevant assertion made by Merit is that it claims to have expended $1,300 in March 1996, to prepare to begin production. There is no evidence that this expenditure was directed to reworking or drilling operations on any of the three leases, as required in the January 19, 1996, 60-day letter. There is no allegation of facts which, if proven, would show compliance with the statute and prevent the lease from terminating. See John S. Pehar, supra, at 193; C & K Petroleum, Inc., supra. Therefore, BLM properly declared the leases terminated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

James P. Terry
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

While I am in agreement with the ultimate conclusion espoused by the lead opinion, viz., that the subject leases have terminated pursuant to the provisions of 30 U.S.C. § 226(i) (1994), I think that the confusion manifested in the instant record as to the workings of that statutory provision, which confusion finds its genesis in the 1988 amendments to 43 C.F.R. § 3107.2-2, cries out for clarification.

The relevant statutory provisions, while redesignated in 1987, 1/ have remained virtually unchanged since their initial adoption in 1954. The statute provides:

> No lease issued under this section which is subject to termination because of cessation of production [2/] shall be terminated for this cause so long as reworking or drilling operations which were commenced on the land prior to or within sixty days after cessation of production are conducted thereon with reasonable diligence, or so long as oil or gas is produced in paying quantities as a result of such operations. No lease issued under this section shall expire because operations or production is suspended under any order, or with the consent, of the Secretary. No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter.

It has been consistently held since the onset of adjudications involving this provision that the statute consists of three separate mandates. See, e.g., Great Western Petroleum and Refining Co., 124 IBLA 16, 24

1/ Prior to 1987, this provision was codified as 30 U.S.C. § 226(f) (1982).

2/ Absent the provisions of 30 U.S.C. § 226(i) (1994), all Federal oil and gas leases which are in an extended term by reason of production would automatically terminate under 30 U.S.C. § 226(e) (1994) and the habendum clause of the lease upon the "cessation of production" since the extended terms continues so long after its primary term "as oil and gas is produced in paying quantities." The only provision which would extend them prior to 1954 was the earlier language section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1948), which provided that leases extended by production would not terminate when production ceased "if diligent drilling operations are in progress on the land under lease during such period of nonproduction."

(1992); Great Plains Petroleum, Inc., 117 IBLA 130, 132 (1990); Michael P. Grace, 50 IBLA 150, 151-52 (1980); Max Barash, 6 IBLA 179, 182 (1972); Steelco Drilling Corp., 64 I.D. 214, 217 (1957). The first part is the general mandate, and it provides in essence that, where cessation of production occurs on a lease in an extended term by reason of production, the lessee has 60 days to commence reworking or drilling operations, in which case the lease will be extended so long as those operations are conducted with reasonable diligence or, alternatively, so long as oil or gas is produced in paying quantities as a result of those operations. This provision applies to all Federal oil and gas leases in an extended term by reason of production unless superceded by one of the subsequent two provisions. Moreover, it is important to point out that there is no notice requirement applicable to the first mandate. 3/ A lease terminates automatically upon cessation of production unless prior to or within 60 days thereafter reworking or drilling operations are commenced and continued with reasonable diligence thereafter.

The first exception to the general mandate relates to those leases on which the Secretary has authorized or concurred in a suspension of production or operations. The second exception relates to those leases on which there exists a "well capable of producing oil or gas in paying quantities." In this latter situation, the lease will not expire 4/ unless the lessee is provided notice "by registered or certified mail" to put the well in a producing status and fails to do so or, alternatively, production ceases without the Secretary's permission after the well has been placed in a producing status. This "well capable" provision is the only provision in 30 U.S.C. § 226(i) (1994) which requires notice to the lessee. 5/

3/ The lack of a notice requirement with respect to terminations because of cessation of production is scarcely surprising. After all, lessees could be expected to know when production on their leases has terminated. While a few Board decisions issued subsequent to the 1988 revisions have stated that notice is required under the cessation of production provision, these decisions have done so by erroneously applying the present regulation in derogation of the statutory language. See, e.g., Abe M. & George Kalaf, 134 IBLA 133, 138 (1995); Samuel Gary Jr. & Associates, Inc., 125 IBLA 223, 228 (1993). These decisions are, for the reasons provided in the text of this opinion, simply wrong.

4/ It is unfortunate that, while the terms "expiration" and "termination" in the context of oil and gas leasing are generally held to encompass different concepts (see, e.g., Getty Oil Co., 72 IBLA 39, 40 (1983)), 30 U.S.C. § 226(i) (1994) employs these two terms virtually interchangeably.

5/ Since this provision would be applicable to situations involving shut-in production (see generally Great Western Petroleum and Refining Co., 124 IBLA 16 (1992); American Resources Management Corp., 40 IBLA 195, 201 (1979); Steelco Drilling Corp., supra, at 219 n.3), it is easily understandable why notice would be required since there would be no event readily obvious to the lessee (as the cessation of production from a lease would be) which would otherwise trigger the requirement to produce.

Indeed, in the Department's first decision interpreting the 1954 amendments, Steelco Drilling Corp., supra, Deputy Solicitor Fritz expressly held that, since the third provision of the subsection was the only one which required notice to the lessee and that provision applied only where the lease contained a well capable of producing oil or gas in paying quantities, "unless there is such a well, a notice under the third provision * * * allowing a lessee not less than sixty days within which to place his well on a producing status would not be proper." Id. at 219.

Consistent with Deputy Solicitor Fritz's analysis, every Departmental decision thereafter which examined the issue held that, in the absence of a well capable of producing oil or gas in paying quantities, leases in an extended term because of production automatically terminate, without notice, upon cessation of production unless reworking or drilling operations are commenced prior to or within 60 days after the cessation of production. See, e.g., Great Plains Petroleum, Inc., supra; Universal Resources Corp., 31 IBLA 61 (1977); Estate of Anna Aronow, 20 IBLA 344 (1975); R.E. Hibbert, 8 IBLA 379 (1972); Max Barash, supra.

Until 1988, the Department's regulations reflected the same analysis. Thus, 43 C.F.R. § 3107.2-2 (1987) dealt with cessation of production and provided that "[a] lease which is in its extended term because of production shall not terminate upon cessation of production if, within 60 days thereafter, reworking or drilling operations are commenced and are thereafter conducted with reasonable diligence during the period of nonproduction." By way of contrast, 43 C.F.R. § 3107.2-3 (1987), which dealt with nonproduction from leases capable of production, provided:

> No lease for lands on which there is a well capable of production in paying quantities shall expire because the lessee fails to produce the same, unless the lessee fails to place the well on a producing status within 60 days after receipt of notice to do so by certified mail from the authorized officer. Such production shall be continued unless or until suspension of production is granted by the authorized officer.

In 1988, the regulations in Part 3100 underwent a major revision, largely occasioned by the adoption of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), as amended, 30 U.S.C. § 226 (1994). It should be noted, however, that while FOOGLRA greatly revised the procedures for leasing and covered many areas which had not previously been addressed, it left intact the language of section 30 U.S.C. § 226(i) (1994), though it did redesignate the subsection. See note 1, supra. Notwithstanding this fact, however, the Bureau of Land Management (BLM) undertook to amend 43 C.F.R. § 3107.2-2 and 43 C.F.R. § 3107.2-3.

In Proposed Rules published on March 21, 1988, BLM announced its intention to amend 43 C.F.R. § 3107.2-2 "to specify the date when the 60-day period begins for commencement of reworking or drilling operations on a lease that is not producing," and further "to amend § 3107.2-3 to make

it consistent with the provision of the Mineral Leasing Act." 53 Fed. Reg. 9216 (Mar. 21, 1988). Insofar as 43 C.F.R. § 3107.2-3 was concerned, BLM proposed the insertion of the following language after the original regulations: "The 60-day period commences upon receipt of notification from the authorized officer that the lease is not capable of production in paying quantities." With respect to the changes to 43 C.F.R. § 3107.2-3, BLM essentially proposed deleting the language requiring a lessee "to place the well on a producing status within 60 days" with language requiring the lessee "to place the lease in production within a period of not less than 60 days as specified by the authorized officer" in order to more closely track with the statutory language. 6/

Final regulations were issued on June 17, 1988. See 53 Fed. Reg. 22814-48. Both of the proposed amendments were adopted without change. As amended, the 43 C.F.R. § 3107.2-2 now reads:

> A lease which is in its extended term because of production in paying quantities shall not terminate upon cessation of production if, within 60 days thereafter, reworking or drilling operations on the leasehold are commenced and are thereafter conducted with reasonable diligence during the period of nonproduction. The 60-day period commences upon receipt of notification from the authorized officer that the lease is not capable of production in paying quantities.

As it presently exists, 43 C.F.R. § 3107.2-2 is not merely in direct and obvious conflict with the statute, but it borders on the indecipherable.

As noted above, the statutory requirement of notification applies only to those leases which contain a well capable of production in paying quantities. 7/ In those cases, however, leases are not extended by reworking

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6/ The statutory language provides that no lease will expire "unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail within which to place such wells in producing status * * *." While the 1988 amendment was more faithful to the statute in that it allowed "not less than 60 days" as opposed to the pre-1988 limitation "within 60 days," its claims to statutory fidelity evaporate when one compares the pre-1988 requirement "to place the well on a producing status" and the post-1988 language "to place the lease in production" with the statutory mandate.

7/ The term "well capable of production in paying quantities" is one which has been the subject of frequent analysis in Board and Departmental adjudications. Thus, the Department has, from the outset, noted that it requires a well for which the drilling has been completed, the casing set and cemented, and perforations made into the appropriate horizons so that the well is physically capable of production at the present time. See, e.g., Joseph C. Sterge, 70 I.D. 375 (1963); United Manufacturing Co., 65 I.D. 106 (1958). In Amoco Production Co., 101 IBLA 215 (1988), the

or drilling operations but by placing the well in a productive status. 8/ Insofar as leases which do not contain a well capable of production, i.e., all of the leases to which the "cessation of production" provision applies, the statute, itself, expressly provides that the lease terminates unless reworking or drilling operations are "commenced on the land prior to or within sixty days after cessation of production." (Emphasis supplied.) To the extent that the regulatory language of 43 C.F.R. § 3107.2-2 presently purports to extend the period for reworking or drilling beyond 60 days after the date production ceases, it is a nullity as it is in direct conflict with the statute. See generally United States v. Larionoff, 431 U.S. 864, 973 (1977); Planned Parenthood Federation of America v. Heckler, 712 F.2d 650, 655 (D.C. Cir. 1983); Women Involved in Farm Economics v. U.S. Department of Agriculture, 682 F. Supp. 599, 606-607 (D.D.C. 1988).

Inasmuch as the absence of a well capable of production in paying quantities is a precondition for application of the "cessation of production" provision in the first instance, it makes no sense to provide that the 60-day period for reworking or drilling commences upon notification that there is no well capable of production in paying quantities since the whole purpose of notification under the statute is to afford a 60-day

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fn. 7 (continued)
Board recounted some of the specific questions which the Department had explored in determining whether or not a well was capable of production in paying quantities:

"The phrase `well capable of producing' means a `well which is actually in a condition to produce at the particular time in question.' United Manufacturing Co., [supra]. In the absence of perforation of the well casing, a well has been held to be physically incapable of production and, hence, not capable of production in paying quantities. Arlyne Lansdale, 16 IBLA 42 (1974); United Manufacturing Co., supra. A well has been held not capable of production in paying quantities where substantial pumping of water from the well is required before oil could be produced in paying quantities. The Polumbus Corp., 22 IBLA 270 (1975). Further, a well has been held not capable of production in paying quantities where sandfracing operations were unsuccessful and the record indicated further efforts were needed to restore production, including hot oil treatment and swabbing the well. Steelco Drilling Co., [supra]."

Id. at 221 (footnotes omitted).

8/ This is true notwithstanding the suggestion appearing in Arjay Oil Co., 138 IBLA 22 (1997), that reworking or drilling operations can extend a lease under the third provision. There is no need to rework or conduct drilling operations on a well which is presently capable of production in paying quantities. Indeed, in Amoco Production Co., supra, at 222, this Board held that if a well needed reworking in order to produce, the well was not capable of producing in paying quantities within the meaning of the statute.

period in which a lessee must place a well which is capable of production in paying quantities in a productive status. Over 40 years ago, Deputy Solicitor Fritz declared that, in the absence of a well capable of production, issuance of a notice to a lessee granting him 60 days to place his well in production would be "wrong." In essence, to the extent that the present 43 C.F.R. § 3107.2-2 purports to do so, it is in direct contravention of the statute.

Moreover, it must be pointed out that what the regulation literally provides is that the authorized officer must notify the lessee that the lease is incapable of production before the 60-day period, which is statutorily based on the cessation of production, commences to start. What exactly does it mean when the authorized officer determines that a lease is not capable of production in paying quantities? Presumably, the authorized officer would be asserting that the lands, themselves, do not contain a sufficient deposit of hydrocarbons as could be recovered at a profit, though on what basis the authorized officer could ever make such a determination is not clear. And this determination would be required before a 60-day notice under 43 C.F.R. § 3107.2-2 could be sent. Far from being an accurate reflection of the statute, the regulation's provision for issuance of a notice that "a lease is not capable of production in paying quantities" is the promulgation of a concept heretofore unknown to the law.

Furthermore, the regulatory language also obscures a significant difference between termination under the cessation of production language and expiration under the well capable of producing in paying quantities provision. Under the former, termination occurs when production ceases, unless reworking or drilling operations are commenced within 60 days and continued with reasonable diligence thereafter. See Estate of Anna Aronow, supra; R.E. Hibbert, supra. Under the latter provision, however, expiration occurs no sooner than 60 days after notice to place the well in a productive status is received. Thus, under the first provision, it is the cessation of production which triggers termination whereas, under the third provision, it is the notice afforded by the authorized officer which serves as the triggering event.

One obvious inference which can be drawn from the 1988 amendments to 43 C.F.R. § 3107.2-2 is that a lease does not terminate for cessation of production until the passage of 60 days after notice. The statute, however, clearly provides that termination occurs upon the cessation of production unless reworking or drilling operations are commenced prior to or within 60 days of cessation. This difference between the statute and the regulation could have a significant effect on the calculation of minimum royalties due since, under the statute, any minimum royalty obligations would automatically end upon cessation of production if no reworking or drilling operations took place within 60 days, while, under the regulation, the obligation to pay minimum royalties could continue indefinitely into the future until the Department provided notice and possibly beyond that

depending upon which interpretation of 43 C.F.R. § 3107.2-2 is embraced. 9/ See generally Edward H. Coltharp, 58 IBLA 234, 238 (1981).

In effect, 43 C.F.R. § 3107.2-2, as it presently exists, constitutes a radical amendment of the automatic termination language of the statute which not only directly contradicts the express language of the statute but which could alter significantly the obligations of lessees who rely on the statutory language to terminate liabilities under their oil and gas leases.

In my view, the confusion which these 1988 amendments can engender with respect to adjudications is made manifest in the actions occurring below. Thus, by letter dated January 19, 1996, the Bighorn Basin Area Director informed appellants that two of the three leases involved herein had last produced in September and October, 1994, while the other lease had last produced in July 1995. After noting that the leases were required to contain a well capable of producing oil and gas in paying quantities or they would be considered to have expired, 10/ he declared that "[p]rior to April 1, 1996, diligent workover operations or drilling operations must be resumed to restore production in paying quantities or these leases will terminate by operation of law."

Thereafter, in a determination issued May 9, 1996, the Chief, Leasable Minerals Section, first related that "[t]he Cody Resource Area Office has determined that the well on WYW05038 and the well on WYW05038-B are not capable of producing oil or gas in paying quantities," and then, after reciting the terms of 43 C.F.R. § 3107.2-2, noted that:

> By certified letter of January 19, 1996, the Cody Resource Area Office notified the operators, they were allowed sixty days in which to commence reworking or redrilling operations. The notice was received on January 23, 1996, and no reworking or drilling operations were commenced within the specified timeframe. Therefore, the term of lease WYW05038 and WYW05038-B are

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9/ As presently written, 43 C.F.R. § 3107.2-2 is actually amenable to three separate interpretations as to when a lease terminates under the cessation of production provision. Under one interpretation, while the obligation to commence reworking or drilling operations does not commence until notice is received, upon the failure to do so the lease terminates effective upon the date of cessation of production. A second interpretation, which is essentially the one which BLM adopted in this appeal, is that failure to rework or drill after notice results in termination effective as of the notice. And a third interpretation would be that the termination, itself, does not occur until 60 days after notice.

10/ Technically, as was noted above, in the absence of a well capable of producing in paying quantities, cessation of production results in "termination" of the lease. Failure to restore a well capable of production in paying quantities to productive status, after a 60-day notice to do so, results in "expiration" of the lease.

exhausted and the leases are held to have terminated by cessation of production effective January 31, 1996.

(Decision at 1.)

While I concur in the conclusion that the instant leases have terminated, I do not believe that the decisions below, particularly with respect to the dates chosen for lease termination, can be reconciled with the applicable statutory language.

In his original letter, the Area Manager noted that the leases no longer contained wells capable of production in paying quantities. While a party which challenges a finding that a well is not capable of production may be afforded a hearing on this question, the allowance of a hearing is predicated upon that party tendering some evidence which would indicate that the well was, in fact, capable of producing in paying quantities. See, e.g., John Swanson, 51 IBLA 239 (1980); Vern R. Bolinder, 40 IBLA 164 (1979). Appellants herein have proffered nothing which would show that the existing wells on the leases are capable of production in paying quantities. Thus, I concur that the "cessation of production" provision applies.

Insofar as termination under the "cessation of production" language is concerned, neither party has submitted anything related to reworking or drilling operations occurring prior to or within 60 days of the various dates of cessation of production. Accordingly, in the absence of any showing that reworking or redrilling operations were conducted on the leases during the statutory time-frame involved, I would find that all three leases have terminated. 11/

Insofar as future adjudications are concerned, I would suggest that our consideration of issues which arise with respect to the termination of oil and gas leases that have been extended because of production should be conducted solely with reference to the statutory language appearing at 30 U.S.C. § 226(i) (1994), at least until such time as BLM amends its regulations so as to correctly reflect the statutory mandates.

James L. Burski
Administrative Judge

11/ Appellants herein have challenged only the fact of termination and not the date on which termination has been deemed to have occurred. While I would fix the termination date of WYW05038 as Oct. 31, 1994, the termination date of WYW05038B as Sept. 30, 1994, and the termination date of WYW0138462 as of July 31, 1995, I also recognize that prior decisions of the Department have not consistently approached the question as to the date on which termination of a lease occurs under the cessation of production provision. Accordingly, I would forego definitive resolution of that issue until the matter is directly presented in an appeal.